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SUPREME COURT, U. S.

October Term, 1974

No. 74-747

DEC 16 19
MICHAEL RODAK, JR.

BETTY S. FARVER,

Petitioner

-vs-

THE CITY OF WESTLAKE,

Respondent

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Owen C. Neff
1118 Hanna Building
Cleveland, Ohio 44115
Attorney for Petitioner

TABLE OF CONTENTS

Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	4
The Manner in Which the Federal Questions are Raised	6
Reasons for Granting a Writ	7
Summary of Argument	16
Conclusion	16
Appendix:	
A- Journal Entry and Memorandum of Court of Common Pleas	18
B- Journal Entry of Court of Appeals	22
C- Rules of Practice of Supreme Court of Ohio	37
D - Orders of Supreme Court of Ohio Overruling Motion to Certify and Dismissing Appeals as of Right	38

TABLE OF AUTHORITIES

Cases

City of Youngstown vs Kahn
112 O. S. 655, pg. 662 9

Nectow vs The City of Cambridge
277 U. S. 183, pg. 190 8

Village of Euclid vs Ambler Realty Co.
272 U. S. 369 8

Constitution

Constitution of the United States
Amendment XIV 3

Other

4 Ohio Jur 2d
Appellate Review Sec. 1119 13

IN THE SUPREME COURT OF THE UNITED STATES

OCtober Term, 1974

No. _____

BETTY S. FARVER,

Petitioner

-vs-

THE CITY OF WESTLAKE,

Respondent

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled causes on September 20, 1974, being cases numbered 74-621 and 74-622 on the docket thereon.

CITATIONS TO OPINIONS BELOW.

The Court of Common Pleas in and for Cuyahoga County, Ohio rendered a memorandum opinion. The Court of Appeals for the Eighth Judicial District, Cuyahoga County, Ohio rendered an opinion, neither of which are reported. The Supreme Court of Ohio rendered no opinion. The memorandum opinion of the Court of Common Pleas and the opinion of the Court of Appeals are included herein as Appendix A and B.

JURISDICTION

The separate judgments of the Supreme Court of Ohio were entered on September 20, 1974. Jurisdiction in this Court is invoked under and by virtue of Title 28, United States Code 1257 (3).

QUESTIONS PRESENTED

1) Whether or not the zoning of the Petitioner's property as single residential use and no other

under all of the facts and circumstances presented in the record was the appropriation of a property right without due compensation, was arbitrary and capricious and finds no justification under the police power regarding public health, safety, welfare and morals.

2) Whether or not the guarantees of procedural due process were afforded in the Petitions in the State Court and whether or not in so doing it failed to follow its own law.

3) Whether or not a municipality in a zoning matter, wherein a property owner is compelled to exhaust her administrative remedy, may refuse to act from May 2, 1968 till February 4, 1971 wherein three (3) times during that period its Planning Commission has recommended action favorably to the Petitioner.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV
". . . nor shall any State deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

These proceedings began on May 2, 1968 when the Petitioner presented a request to the Council of the City of Westlake in the State of Ohio for relief from a City ordinance that arbitrarily zoned her property consisting of approximately thirty (3) acres for single family residences only. The matter was referred to the Planning Commission of the City Council, who were chosen for their expertise in the field. On three (3) separate occasions the Commission recommended that the premises be re-zoned for multi-family use as requested by the Petitioner. Notwithstanding, the Council refused to act until February 4, 1971 at which time the proposal was defeated.

In order to further exhaust her administrative remedy the Petitioner applied to the Board of Zoning Appeals of the City of Westlake, where an extensive public hearing was had upon the issue of a variance from the ordinance as a hardship case. That appeal was denied on August 29, 1972.

The Petitioner effected two remedial appeals, one by way of direct action in the Court of Common Pleas of Cuyahoga County, Ohio, in the nature of a declaratory judgment and injunction action; the other by way of appeal under the Administrative Procedure Act to the Court of Common Pleas. These two actions were consolidated at trial and the records of both considered in each. The Court of Common Pleas denied relief to the Petitioner in each instance.

The Petitioner perfected her appeal to the Court of Appeals for the Eighth Judicial District of Cuyahoga County, Ohio, which in each instance affirmed the judgment below.

The Petitioner then moved the Supreme Court of Ohio to assume jurisdiction, which in Ohio is a proceeding in the nature of a motion to certify, and proceeded by way of direct appeal on constitutional grounds. Both motions were denied on September 20, 1974.

THE MANNER IN WHICH THE FEDERAL QUESTIONS ARE RAISED

The Petitioner sought review in the Supreme Court of Ohio of the lower court decisions. The right to review in the Supreme Court of Ohio is dependent upon the discretion of the Court in determining that a substantial constitutional question exists or that the case is one of public or great general interest. See Appendix C.

In the proceedings before the Supreme Court of Ohio and in the lower courts the Petitioner argued that the adjudication of the legal issues presented involved Federal Constitutional questions.

The Supreme Court of Ohio, without a hearing, dismissed the appeal of the Petitioner for the reason that no substantial constitutional question existed and overruled the petitioner's memorandum in support of jurisdiction, which is a proceeding in the nature of a motion to certify. Appendix D.

REASONS FOR GRANTING THE WRIT

1) The decision of the Court of Common Pleas of Cuyahoga County, Ohio, affirmed by the Court of Appeals in and for the Eighth Judicial District, appeal refused in the Supreme Court of Ohio, is arbitrary, capricious, unconstitutional and void and has, under all of the facts and circumstances presented in the record, no reasonable relationship to the valid exercise of the police power for reasons of public health, safety, welfare or morals.

The facts documented in the record are succinctly presented in the proposed syllabus required by brief in the Supreme Court of Ohio. It was as follows:

> Where a property owner requests re-zoning on May 2, 1968 with no final action by the Council until February 4, 1971; Where the Planning Commission of that Council on three separate occasions recommends that the premises be re-zoned as requested; where within that period, land immediately adjacent to the subject premises is re-zoned for multi-family use up to, but not beyond, the irregular property line of the owner, with no street, highway or other natural boundary intervening, thereby

excluding the exact boundary of the owner's property; where the subject premises are in part covered by a fireline easement from a United States Government nike site; where the premises are surrounded by commercial property apartments, greenhouses and nursery property, a church and parking area, a convent and, in particular, a trailer park for mobile homes; where there have been no new housing starts of even modestly priced residential property in over fifteen years; where the plan proposed by the City for single family residential use would leave 28% of the land unavailable for that use; where at a cost of $75,000 per residence, the single family property is priced out of the market; where for multi-family use it would have a value of $620,000 and where there is no evidence presented to show that multi-family use would in any way offend against the public health, safety, welfare or morals, the refusal of the City Council to re-zone and/or grant a building permit is arbitrary, capricious, unconstitutional and void.

This Court held in the VILLAGE OF EUCLID vs THE AMBLER REALTY COMPANY, 272 U.S. 369 that a zoning ordinance "must find its justification in some aspect of the police power asserted for public welfare". (page 387, emphasis supplied)

This Court subsequently held in NECTOW vs THE CITY OF CAMBRIDGE, 277 U.S. 183 at page 190:

"Taking into account the character of this location and the uses of the real estate adjacent,

immediately and diagonally across therefrom, and the natural development thereof, this court has no difficulty in finding that relator's real estate, situated as it is on the heavily traveled thoroughfares, has little suitability for residential use, but rather is a prime business site, so that the zoning thereof as residence "A" has no tendency to promote the public health, safety, morals, convenience or general welfare, and bears no reasonable relation thereto."

The facts and circumstances of the instant appeal weigh far more heavily in favor of the Petitioner as a property owner than those presented in NECTOW. 8 McQUILLIN on Municipal Corporations at Section 28.18 -.38 states that zoning cannot go beyond that purpose, namely of justification under public health, safety, welfare and morals. Otherwise, the taking is unlawful.

We are met on the threshold of this appeal with the decision of the Supreme Court of Ohio in the City of YOUNGSTOWN vs KAHN, 112 Ohio State 655, which held at page 662 thereof:

"Neither are the people who live in apartment houses less moral per se than those who live in single dwellings. Since an

apartment house does not of itself constitute a nuisance, we fail to see how its exclusion from a residence district of the specific kind here created falls within the police power. In other words, the ordinance has no reasonable relation to the public health, safety or morals." (emphasis supplied)

And at the bottom of page 663:

"We see less reason for excluding an apartment house from a strictly residence district than for excluding a store or other business of a non-nuisance character from a strictly residence district. Ordinances prohibiting the establishment of a non-nuisance business within a residence district have frequently been held unconstitutional, upon the ground that they constitute a taking of private property without compensation." (citations ommitted)

Thus Ohio has held and its law remains that

partments or multi-family use is not the criterion

f control.

In the argument before this Court in AMBLER,

minent Counsel said:

"The recent industrial development of the City of Cleveland, following the railroad lines has already reached the village and to some extent extends over into it. In its obvious course, this industrial expansion will soon absorb the area in the village for industrial enterprises. It is in restraint of this prospect that the ordinance seeks to operate. In effect it erects a dam to hold back the flood of industrial development and thus to preserve

a rural character in portions of the Village which under the operation of natural economic laws, would be devoted most profitably to industrial undertakings. This, the evidence shows, destroys value without compensation to the owners of lands who have acquired and are holding them for industrial use.

Since the industrial development of a great City will go on, the effect of this attempted action necessarily is to divert industry to other less suitable sites, with a consequent rise in value thereof; so that the loss sustained by the proprietors of land who cannot so use their land is gained by proprietors of land elsewhere. In other words, the property, or value, which is taken away from one set of people, imposing an uncompensated loss on the one hand, and a gain which is arbitrary and unnatural on the other hand, since it results, not from the operation of economic laws, but from arbitrary considerations of taste enacted into hard and fast legislation."

Speaking as a true Democrat in the highest sense of the word, he concluded:

"That our cities should be made beautiful and orderly is, of course, in the highest degree desireable, but it is even more important that our people should remain free. Their freedom depends upon the preservation of their constitutional immunities and privileges against the desire of others to control them, no matter how generous the motive or well intended the control which it is sought to impose."

Time and political caprice have proven Mr. Baker right. Today the residential needs of a great City are expanding and exerting their force upon the suburbs. In AMBLER the need was industrial. In the instant matter the full force of the thrust is residential. The suburbs must be prepared to meet the thrust else the City die.

2) Under the law of the State of Ohio a litigant has a positive right, the refusal of which is prejudicial reversable error, upon seasonal request, to receive from the Court findings of fact and conclusions of law and the failure to enter the same is an unequal protection of the law.

At the conclusion of the proceedings in the trial court the Petitioner seasonably requested the court to find and state the facts separately from its conclusions of law.

Rule 52 of the Ohio Rules of Civil Procedure provides that upon such timely request ". . . the court shall state in writing the conclusions of fact

found separately from the conclusions of law". This provision confers a substantial right. 53 Ohio Jurisprudence 2d 364 and by its express terms imposes a mandatory duty upon the trial court. The Supreme Court of Ohio so held in CLEVELAND PRODUCE CO. vs DENNERT 104 Ohio State, 149. The rationale thereof is set forth at page 152 by the then Chief Justice, which inter alia recites that until such is done, it is impossible for a reviewing court to determine whether the case turned upon the facts or upon an erroneous application of legal principles. The opinion concludes that the appellant had been deprived of a substantial legal right. See 4 Ohio Jurisprudence 2d, Appellate Review, Sec. 1119:

> "The statutory provision that when questions of fact are tried by the court, the court shall upon request of one of the parties, state in writing the conclusions of fact found separately from the conclusions of law, provided that such request is properly and timely made, confers a substantial right and is mandatory". (emphasis supplied)

It is submitted that there was no set of facts which the court could have found on the face of the record, exhibits, evidence and stipulations which would have justified its finding.

The City sought to justify this non-observance of Rule 52 by the following arguments: 1) That the Court in its memorandum opinion has so found and is, therefore, excused from the mandate. But a brief examination of that memorandum will reveal that in no sense of the word could it be used as an adequate substitute for findings; 2) That the court was excused from so finding by local rule 19 (B). This rule provides that the court ". . . shall direct the party making the written request to prepare, within five (5) days, proposed findings of fact and conclusions of law. . ." The record is clear that the court never made such direction. The local practice is for the court to refer the matter to successful counsel or to make its own findings as in the Federal system.

3) Where a property owner files a request for the re-zoning of residential property on May 2, 1968 and no final action is taken thereon until February 4, 1971 in spite of three (3) separate recommendations made by the Planning Commission experts to the City Council, the disposition of the asserted right is so long delayed as to itself be an infringement of the Constitutional guarantee.

The oft-repeated phrase that justice delayed is justice denied is applicable here. The Petitioner was required to first exhaust her administrative remedies before proceeding to a court of law to enforce those rights. As indicated, the Council had before it on three (3) separate occasions the recommendation of its own experts, namely, the Planning Commission. It needed nothing further to move. The Petitioner could reasonably assume that the final determination would be adverse to her asserted right, but she was, nevertheless, locked in and denied the right to proceed under the require-

ment that she first exhaust her administrative right. Thus the Council could successfully postpone her right to proceed and this it did for three (3) years.

The Constitutional infringement is self-evident.

SUMMARY OF ARGUMENT

The record in this case reveals that the trial court was under a mandatory duty to enter its findings of fact and conclusions of law. It failed and refused to do so upon seasonable request. That ground alone dictated a reversal in the State Court.

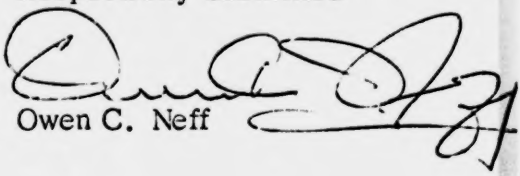
The facts of this matter present a clear case upon which reasonable minds could not differ. The action of the City Council in 1970 re-zoned the land immediately adjacent to the subject premises for apartment use. This act specifically excluded the Petitioner's land and, in fact, did so by legal description. The record is uncontradicted as to the facts hereinbefore set forth. The land is without value for single-family residential purposes. The expert called by the

City testified that 28% of the land area could not be used for that purpose. The delay of three (3) years time deprived the Petitioner of any effective assertion of her rights. We submit that there is no set facts which could have been found on this record which would justify the determination below.

CONCLUSION

For the foregoing reason, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted



Owen C. Neff

APPENDIX A

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

BETTY S. FARVER,	*	Case No: 909 609
	*	
PLAINTIFF	*	J. George J. McMonagle
	*	
-vs-	*	JUDGMENT ENTRY
	*	
CITY OF WESTLAKE	*	
et al	*	
DEFENDANTS	*	
	*	

This cause came on to be heard on the 22nd day of February, 1973, upon the pleading and the transcript of the evidence and the record of the Board of Zoning Appeals of the City of Westlake, and was argued by counsel for the parties, and upon consideration the court finds no error prejudicial to Appellant.

Each assignment of error was reviewed, and upon review the following disposition made:

As to Assignment of Error No. 1, the court finds that the decision of the Board of Zoning Appeals and all proceedings in connection therewith were not unconstitutional, illegal, arbitrary, capricious or unreasonable.

As to Assignment of Error No. 2, the court finds that the decision of the Board of Zoning Appeals in every respect was in conformity to law.

As to Assignment of Error No. 3, the court finds that upon the whole record, the decision of the Board of Zoning Appeals of the City of Westlake is supported by the preponderance of substantial, reliable and probative evidence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decision of the Board of Zoning Appeals of the City of Westlake be and the same is hereby affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs herein are taxed against the Appellant.

_____
Judge George J. McMonagle

Approved:

_____
Owen C. Neff, Attorney for Plaintiff-Appellant

_____
Patrick A. Gareau, Attorney for Defendant-Appellee

Date: _____

IN THE COURT OF COMMON PLEAS

CASE NO: 909 609

STATE OF OHIO :
: SS
CUYAHOGA COUNTY:

BETTY S. FARVER, *
*
PLAINTIFF *
*
-vs- * MEMORANDUM TO
* COUNSEL
CITY OF WESTLAKE, et al *
*
DEFENDANTS*
*

GEORGE J. McMONAGLE, J:

In this appeal from the decision of the Board of Zoning Appeals of the City of Westlake, the Court finds that the decision of the said Board of Zoning Appeals and all proceedings in connection therewith is not unconstitutional, illegal, arbitrary, capricious, or unreasonable and is supported by the preponderance of substantial, reliable and probative evidence on the whole record and the decision of the said Board of Zoning Appeals is affirmed.

Counsel for the defendant shall prepare a judgment entry herein and submit it to the counsel for the plaintiff before presentation to the court.

George J. McMonagle,
Judge

Appearances:

On Behalf of the Defendant
Patrick A. Gareau, Esq.
21330 Center Ridge Road
Rocky River, Ohio 44116

On Behalf of the Plaintiff
Owen C. Neff, Esq.
1118 HannaBuilding
Cleveland, Ohio 44115

April 3, 1973

APPENDIX B

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 32694

BETTY S. FARVER,	*	APPEAL FROM
	*	COMMON PLEAS COURT
APPELLANT	*	NO: 909 609
	*	
-vs-	*	JOURNAL ENTRY
	*	
CITY OF WESTLAKE, et al,	*	
	*	
APPELLEES	*	
	*	

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Appellant Betty S. Farver owns a tract of land which is zoned single-family residential by the

City of Westlake, Ohio. In May, 1968 she requested the Westlake City Council to rezone the property to allow the construction of apartments. The request was referred to the Planning Commission which recommended that no decision be made because the entire Westlake Zoning Code was in the process of being rewritten. The new code permitted apartments up to the northern boundary of the appellant's property, but left the Farver property zoned single-family residential.

In 1970 the appellant again requested that the zoning ordinance be amended, and the Council again referred the matter to the Planning Commission. Although the Commission recommended that the request be granted, the Council unanimously rejected any change.

In 1972 the appellant applied for a building permit to construct apartments on her land. The permit was refused because of the zoning ordinance. Mrs. Farver appealed to the Westlake Board of Zoning Appeals, asking the Board to grant a variance and order the permit granted.

At a public hearing before the Board, the appellant testified that no single-family residences had been built in the area since she acquired the property in 1965. The City presented the testimony of Robert Hill, a city planner, and William Braman, an appraiser, each of whom testified that, in his opinion, the Farver land was suitable for a housing development of single-family units. After hearing the evidence, the Board refused the variance.

The appellant subsequently filed two actions in Common Pleas Court: (1) An appeal from a decision of the Zoning Board; (2) An original action asking for a declaratory judgment that the zoning ordinance as applied to the Farver property is unconstitutional. The cases were consolidated for hearing before Common Pleas Judge McMonagle. By stipulation of the parties, all testimony and exhibits presented to the Zoning Board were admitted as evidence in the Common Pleas actions. At the request of the court, the parties agreed to proffer to the court, by written instrument, the testimony of any

witnesses to be called in the declaratory judgment action.

The testimony of Edward Share, a real estate agent, was proffered on behalf of Mrs. Farver. It was stipulated that were Mr. Share to testify, he would state that he had studied the Farver property and the surrounding area and that, in his opinion, the selling price of a single-family house constructed on the land would be approximately $75,000. Mr. Share also believed that it would be extremely difficult and perhaps impossible to sell houses at that price in this area.

The City proffered further testimony of William Braman, the appraiser who had testified before the Board. Mr. Braman stated that a subdivision of a single-family house had recently been built in Rocky River, approximately 400 feet east of the Farver property. In his opinion, this substantiated his previous conclusion that a subdivision of houses could profitably be built in the appellant's property.

The City also proffered the testimony of Kenneth Crandall, a city planner who had been

involved in the drafting of the new Westlake Zoning Code. In this capacity Mr. Crandall had considered the feasibility of constructing apartments on the Farver land. He stated that the primary reason for zoning the tract single-family residential was the current lack of educational facilities in the area. Mr. Crandall projected that single-family residences would cause an influx of approximately 48 new students, whereas apartments would result in an increased enrollment of 200 students. In his opinion, the Westlake school system could absorb an increase of 48 students but did not have the capacity to accommodate 200 additional students.

After viewing the premises, hearing oral arguments, and considering the written testimony, Judge McMonagle ruled: (1) The denial of the variance was supported by substantial, reliable and probative evidence; (2) The Westlake zoning ordinance as applied to Mrs. Farver's land bears a reasonable relationship to the public health, safety and morals. The appellant requested Findings of

Fact and Conclusions of Law pursuant to Civil Rule 52. This request was overruled by Judge McMonagle because the appellant had not submitted proposed findings and conclusions as required by Cuyahoga County Common Pleas Court Rule 19. Mrs. Farver appeals both decisions of the Common Pleas Court.

1. Case no. 32694: The Denial of the Variance

The power of the Westlake Board of Zoning Appeals to grant a variance is governed by Westlake Codified Ordinance Section 1233.04, which provides:

> (d) Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this Zoning Code, on appeal from a decision of the Director, the Board shall have the power in a specific case, by special permit, to vary or modify the application of any such provisions in harmony with the general purpose and intent of this Zoning Code so that the public health, safety, morals and general welfare may be secured and substantial justice done. Such variance shall be limited to specific cases where the following conditions also exist:

(1) The practical difficulty or unnecessary hardship inheres in and is peculiar to the premises sought to be built upon or used because of physical size, shape or other characteristics of such premises or adjoining premises which differentiate such premises sought to be built upon or used from other premises in the same district andas to such premises sought to be built upon or used will create a difficulty or hardship caused by a strict application of the provisions of this Zoning Code not generally shared by other lands or structures in the same district.

(2) Refusal of the variance or modification appealed for will deprive the owner of the premises sought to be built upon or used of substantial property rights; and

(3) Granting of the variance or modification appealed for will not be contrary to the purpose and intent of the provisions of this Zoning Code.

e) When appealing for a variance or modification, the appellant shall state and substantiate his claim that each of the three conditions listed under subsection (d) hereof exists. The Board shall make a finding on each of such three conclusions as they apply in each specific case as a prerequisite for the granting of the variance or modification.

To be entitled to a variance, the burden was on Mrs. Farver to prove: (1) That building single-family houses on her land would entail some "Unnecessary

hardship. . . peculiar to the premises. . . not generally shared by other lands in the zoned area"; (2) That refusal of the variance would deprive her of "substantial property rights"; (3) That granting the variance would "not be contrary to the purpose . . . of this Zoning Code".

The evidence before the Board of Zoning Appeals clearly established that these elements did not exist. Mrs. Farver presented no evidence that the physical characteristics of her land differed from those of other property in the district. The City's expert, Robert Hill, did state that because of the odd shape of the tract, houses could be built on only 75% of the property. However, Hill further testified: "Its very seldom that you will find a configuration in the land that lends itself exactly to the development with a street and lots of the required zoning depth and width off both sides". Therefore the problem of fully utilizing one's land to build houses is not peculiar to the Farver tract but rather is shared generally by most property in the district.

Mrs. Farver also failed to show that the zoning ordinance deprived her of a substantial property right. Although the land would have been more valuable if zoned for apartments, the testimony of the City's experts established that the land as presently zoned can be profitably developed for single-family houses.

The final element of Section 1233.04 is that the granting of a variance will not be contrary to the "purpose and intent" of the zoning code. The Westlake zoning code was adopted in 1970 after several years of planning. After specifically studying the Farver situation, the Council made a legislative judgment to leave the property zoned single-family. Had the Zoning Board granted a use variance a mere two years later, it would ineffect have been substituting its judgment for that of the City Council. To do so would clearly have violated the "purpose and intent" of the zoning code. See Mobil Oil Corp. v Rocky River, 38 Ohio St. 2d 23 (1974), Corrigan, Jr. concurring at 31.

Mrs. Farver failed to establish any of the three requirements of Section 1233.04. The decision of the Westlake Zoning Board is supported by reliable, substantial and probative evidence, and is, therefore, affirmed.

II. Case no. 32695: The Denial of Declaratory Judgment.

A zoning ordinance, like any properly enacted legislation, is presumed constitutional. Mrs. Farver had the burden of proving two elements to rebut this presumption; (1) The value of her land is actually and substantially impaired by enforcement of the ordinance; (2) The ordinance, insofar as it prohibits her from constructing apartments on her land, has no relationship to the legitimate exercise of the police power by the City of Westlake. Alsenas v Brecksville, 29 Ohio App. 2d 255 (1972).

In regard to the first element, the appellant presented the testimony of Edward Share that the selling price of houses on the property would be

$75,000. In Mr. Share's opinion, buyers would be unwilling to pay this price for houses on the Farver land. The City rebutted this testimony by evidence that houses recently constructed within 400 feet of the Farver property were selling for $50,000 to $70,000. The trial judge could properly conclude from this conflicting evidence that the land as presently zoned still has substantial value.

Even if the appellant were able to prove a substantial diminution in the value of her land, she would further have to show that the ordinance as applied to her property bears no relationship to the health, safety and welfare of the community. Mobil Oil Corp. v Rocky River, 38 Ohio St. 2d 23, 29 (1974). If the existence of such a relationship is "fairly debatable", the ordinance is constitutional. Cleveland Trust Co. v Village of Brooklyn, 92 Ohio App. 352 (1952).

In the present action the City presented the testimony of a planning expert, Kenneth Crandall, who stated that the Westlake school system would be

overly burdened if apartments were constructed on the Farver property. Congested educational facilities are a matter of public concern and may be regulated through zoning ordinances. See Gruber v Mayor and Township Committee of Resitan, 39 N. J. 1 (1962); 1 Anderson, American Law of Zoning, Section 726 (1968). Since reasonable minds could differ as to the relationship of the ordinance to the health, safety and welfare of the community, the trial judge correctly held the ordinance constitutional.

Appellant further assigns as error the failure of Judge McMonagle to make Findings of Fact and Conclusions of Law. The appellant requested the findings and conclusions in a motion dated April 20, 1973. On May 17, 1973 Judge McMonagle overruled this request because of the appellant's failure to comply with the Cuyahoga County Common Pleas Rule 19(B), which provides in part:

> "When a request for findings of fact and conclusions of law is made, the judge shall direct the party making the written request to prepare, within five (5) days, proposed

> findings of fact and conclusions of law and submit them to the opposing counsel. Within ten (10) days after its receipt by opposing counsel, the proposed findings shall be submitted to the Court with objections and counter proposals, if any, in writing; however, only those findings of fact and conclusions of law made by the Court shall form part of the record."

The appellant admits that she did not submit proposed findings and conclusions, although the record is silent as to whether she was specifically directed to do so by the trial judge.

The local rule contemplates that proposed findings be submitted in every case. Even assuming that Judge McMonalge did not "direct" the appellant, she nonetheless should have submitted proposed findings to the court and opposing counsel within the time prescribed by the rule.

Moreover, the appellant has been in no way prejudiced by the refusal of the trial court to make findings of fact and conclusions of law. In reviewing the decisions of the court below, this appellate court has considered an extensive record, including all of the testimony and exhibits presented

before the Zoning Board and Common Pleas Court. We conclude from the evidence that the exclusion of apartments from the appellant's property was a legitimate exercise of the City's Police Power, and the denial of the declaratory judgment is therefore affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Jackson, P. J. _____

Corrigan, Jr. _____

Manos, J. concur. _____

_____
Presiding Judge
LEO A. JACKSON

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

For plaintiff appellant: Owen C. Neff

For defendants-appellees: Patrick Gareau

APPENDIX C

RULES OF PRACTICE OF THE SUPREME COURT OF OHIO

RULE II

Section 3. Consideration as to Existence of Constitutional Question.

(a) If an appellant contends that a case involves a substantial constitutional question and also contends that such case is of public or great general interest, it is necessary to file only one notice of appeal.

(b) Where appellant claims that he has an appeal as of right (i.e., that the case involves a constitutional question), the Supreme Court will sua sponte consider the case as on a motion to dismiss said appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO
Nos. 74-821 and 74- 822

1974 Term
To wit: September 20, 1974

Betty S. Farver,

Appellant

-vs-

City of Westlake,

Appellee

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

(Certification Omitted)

****

(caption as above)

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

These causes, here on appeals as of right from the Court of Appeals for Cuyahoga County, were considered in the manner prescribed by law, and, no motion to dismiss such appeals having been filed, the Court sua sponte dismisses the appeals for the reason that no substantial constitutional question exists herein.

(Certification Omitted)

Supreme Court of the United States

October Term, 1974
No. 74-747

BETTY S. FARVER,
Petitioner,

vs.

CITY OF WESTLAKE.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT CITY OF WESTLAKE IN OPPOSITION

PATRICK A. GAREAU
21330 Center Ridge Road
Rocky River, Ohio 44116
Telephone: (216) 333-3100
Counsel for Respondent City of Westlake

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional Provision Involved 2
Statutes Involved 3
Statement of the Case 4
Reasons for Denying Certiorari 7

I. There has been no unconstitutional deprivation of property without due process of law; in that the single-family residential zoning of the petitioner's property, under the facts and circumstances presented, bears a reasonable relationship to the general health, welfare and safety of the public and is a legitimate exercise of the police power 7

II. This court lacks jurisdiction to consider the second question presented by the petitioner 14

III. This court lacks jurisdiction to consider the third question presented by the petitioner 16

Conclusion 21

TABLE OF AUTHORITIES

Cases

Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954) 10

Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1162, 22 L. Ed. 2d 398 (1969) 16

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 19

Cleveland and Pittsburgh Railroad Company v. City of Cleveland, Ohio, 235 U.S. 50, 35 S. Ct. 21, 59 L. Ed. 127 (1914) 16

Mobil Oil Corp. v. City of Rocky River, 38 Ohio St. 2d 23, 309 N.E.2d 900 (1974) 10

Monks v. New Jersey, 398 U.S. 71, 90 S. Ct. 1563, 26 L. Ed. 2d 54 (1970) 16

Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925) 9

Tacon v. Arizona, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973) 15, 16, 19

Village of Belle Terre v. Boraas, ... U.S. ....., 94 S. Ct. 1536 (1974) 10, 11

Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926) 8, 10, 12

Constitution and Statutes

United States Constitution, Fourteenth Amendment 2, 14, 17

28 U.S.C. Section 1257 (3) 2, 3, 14, 15

Ohio Revised Code, Chapter 2506 ..... 3, 6, 20

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OPINIONS BELOW

The Court of Common Pleas in and for Cuyahoga County rendered a memorandum opinion. The Court of Appeals for Cuyahoga County rendered an unreported decision. The Supreme Court of Ohio denied the petitioner's motion to assume jurisdiction. All three opinions are properly reproduced in the petitioner's brief in support of her petition for writ of certiorari and will not be reproduced herein.

JURISDICTION

Separate judgments of the Supreme Court of Ohio were entered on September 20, 1974. Petitioner alleges jurisdiction under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the zoning of the petitioner's property bears a reasonable relation to the public health, safety, and welfare and is a legitimate exercise of the police power.

2. Whether the petitioner may raise the issue of procedural due process before this court when she failed to raise the issue in any of the proceedings in the state courts below.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

28 United States Code Section 1257 (3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

Ohio Revised Code, Chapter 2506, Section 2506.01. Appeal from decisions of any agency of any political subdivision.

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.

The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person; nor any order issued preliminary to or as a result of a criminal proceeding.

STATEMENT OF THE CASE

Since the facts of this case are such an integral part of the petitioner's complaint before this court, we feel it is necessary to set them out more fully than the summary treatment contained in the petitioner's statement of the case.

On May 2, 1968, John A. Thomson, a realtor, on behalf of Mrs. Betty S. Farver (hereinafter referred to as the petitioner), submitted to the Council of the City of Westlake a letter requesting that the subject property be rezoned from single-family to multi-family use. On May 16, 1968, the Council referred this request to the Planning Commission for recommendation. No action was taken on this request at the time because during that period the Planning Commission and the Council were devising a new Comprehensive Zoning Code and Zoning Map. On January 6, 1970, a second request was made on behalf of the petitioner to rezone the property. On January 15, 1970, the Council referred the matter to the Planning and Zoning Committee of Council. Thereafter, Ordinance No. 1970-56 was drafted and placed on the Council agenda. The Planning and Zoning Committee recommended that the ordinance be further considered by Council, and the

ordinance was placed on Council's agenda for its regular meeting of October 1, 1970. A public hearing was advertised and held as provided by the Charter of the City of Westlake, and was conducted on the evening of February 4, 1971. The Ordinance, No. 1970-56, was voted on that night by Council and unanimously defeated.

Thereafter, the petitioner appealed this decision of the Council to the Cuyahoga County Common Pleas Court, Case No. 891890. The case was heard on May 24, 1972. The Court granted the City of Westlake's motion for an order dismissing the appeal for want of jurisdiction. The petitioner then appealed this decision to the Cuyahoga County Court of Appeals, Case No. 32029. On March 8, 1973, the Court of Appeals rendered its decision affirming the decision of the Court of Common Pleas.

While the action appealing the Council's refusal to rezone was being heard, the petitioner filed another action for a declaratory judgment. The answer of the respondent City of Westlake alleged that the petitioner failed to exhaust her administrative remedies. Therefore, on August 8, 1972, the petitioner requested that the Westlake Director of Inspections issue a building permit to her for the construction of multi-family buildings. The Director denied the application since the property was not zoned for her proposed use. The petitioner then appealed the Director's refusal to the Zoning Board of Appeals of the City of Westlake. The matter was heard before the Zoning Board of Appeals after advertising for a public hearing on the request on August 29, 1972. After presentation of all the testimony and the exhibits, the Zoning Board of Appeals denied the petitioner's request.

After the decision of the Zoning Board of Appeals was sent to the petitioner, an appeal was perfected to the Common Pleas Court under the Administrative Appel-

late Act, Chapter 2506 of the Ohio Revised Code. A complete record of the testimony and exhibits taken by the Zoning Board of Appeals was submitted to the Court of Common Pleas pursuant to law. Counsel for the petitioner submitted the following Assignments of Error as the basis of her appeal to the Common Pleas Court:

1. The decision of the Board of Zoning Appeals is arbitrary, capricious, unconstitutional, and void.
2. The decision of the Board of Zoning Appeals is contrary to law.
3. The decision of the Board of Zoning Appeals is contrary to the manifest weight of the evidence.

After reviewing the record of the Zoning Board of Appeals and the additional testimony introduced at trial, the court found in favor of the respondent City and denied the petitioner's request.

After this appeal from the Board of Zoning Appeals was concluded by the trial court, the action for the declaratory judgment was then heard by the same court (Case No. 907,277). The same and sole issue was again tried; namely, that the zoning on the part of the City was unreasonable, arbitrary, capricious, and a denial of the petitioner's constitutional rights. All of the testimony and exhibits presented to the Board of Zoning Appeals was again admitted into evidence by stipulation of the parties. At the request of the court, the parties agreed to proffer to the court, by written instrument, the testimony of any additional witnesses to be called in the declaratory judgment action.

This case came on for final hearing on February 22, 1973. Upon consideration, the court again found against the petitioner.

The petitioner then appealed this decision to the Court of Appeals, Case No. 32695, as well as the decision of the Common Pleas Court involving the appeal from the Zoning Board of Appeals, Appellate Case No. 32694. The motion by petitioner to consolidate the appeals was overruled. The cases were heard and argued together. The Court of Appeals reviewed an extensive record encompassing all the testimony and exhibits presented before the Zoning Board and Common Pleas Court.

The Appellate Court succinctly summed up the testimony in its journal entry, set out in Appendix B of the petitioner's request for a writ of certiorari and does not demand repetition here. In both cases the court affirmed the decision of the Common Pleas Court and denied the petitioner her requested relief.

The petitioner then moved the Supreme Court of Ohio to assume jurisdiction over both cases. Both motions were denied on September 20, 1974.

REASONS FOR DENYING CERTIORARI

I. THERE HAS BEEN NO UNCONSTITUTIONAL DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW; IN THAT THE SINGLE-FAMILY RESIDENTIAL ZONING OF THE PETITIONER'S PROPERTY, UNDER THE FACTS AND CIRCUMSTANCES PRESENTED, BEARS A REASONABLE RELATIONSHIP TO THE GENERAL HEALTH, WELFARE, AND SAFETY OF THE PUBLIC AND IS A LEGITIMATE EXERCISE OF THE POLICE POWER.

A starting point for a discussion of the legal principles for the creation and challenge of zoning ordinances is

this court's landmark decision in the *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). With this decision the concept of comprehensive zoning legislation for a community achieved permanent acceptance throughout our country. This court established the general guideline or test by which a court may review the validity of a zoning ordinance:

> "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maximum *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. *Sturgis v. Bridgeman*, L.R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. *If the validity of the legislative*

classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. Radice v. New York, 264 U.S. 292, 294. (Emphasis added) 272 U.S. 365, 387.

The Supreme Court of the State of Ohio preceded this court by one year in promulgating the same guideline for Ohio courts in *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925). In this case the court held:

"Laws enacted in the proper exercise of the police power which are reasonably necessary for the preservation of the public health, safety and morals, even though they result in the impairment of the full use of property by the owner thereof, do not constitute a 'taking of private property' within the meaning of the constitutional requirements as to making compensation for the taking of property for public use and as to the deprivation of property without due process of law." 112 Ohio St. 628

The court amplified this principle of law beginning at page 638:

"As a preface to our discussion of this question we must remind ourselves that the test is not whether this court sitting as a city council, would have enacted the ordinance challenged. The members of this court may or may not conceive that such an ordinance is wisely calculated to preserve the public health, morals or safety. If the ordinance discloses no purpose to prevent some public evil or to fill some public need, and has no real or substantial relation to public health, morals, and safety, it must be held void. *When, however, legislation does have a real and substantial relation to the prevention of conditions detrimental to the public health, morals, or safety, no matter how*

unwise the measure itself seems to individual judges, it is not for the judicial tribunals to nullify it upon constitutional grounds. (Citations Omitted). *The courts in such cases have no right to determine whether the measures questioned are wise or the best that might have been adopted. The courts cannot hold such laws invalid upon the mere ground of inexpediency.* In other words, the question of the reasonableness of this ordinance is one, in the first instance, for the determination of the council which enacted it." (Emphasis added).

This "reasonable relation" standard still remains the test applied by the courts of the State of Ohio. *Cf., Mobil Oil Corp. v. City of Rocky River*, 38 Ohio St. 2d 23, 309 N.E.2d 900 (1974).

This court, itself, was recently faced with a set of circumstances similar to the case at bar. The case of the *Village of Belle Terre v. Boraas*, 94 S. Ct. 1536 (1974), involved a zoning ordinance restricting the respondent's land use to one-family dwellings thereby excluding the proposed multi-family use. This court sustained the validity of the ordinance holding that it was an example of economic and social legislation with respect to which the legislature has drawn lines in the exercise of its discretion. The decision reaffirmed the test originally established by this court in the *Euclid* case; that is, whether the ordinance is reasonable, not arbitrary and bears a rational relationship to a state objective. In its opinion discussing the reasonableness of a zoning ordinance, this court quoted its earlier decision in *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954):

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . The values

it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 94 S. Ct. 1536, 1539.

Specifically considering the zoning ordinance before the court, namely, an ordinance excluding multiple dwellings, this court stated:

"The regimes of boarding houses, fraternity houses and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, *supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clear air make the area a sanctuary for people." 94 S. Ct. 1536, 1541.

The case at bar involves the petitioner's proposed use of multi-family dwellings in a single-family use district thereby creating all the same problems of noise, cars, and overcrowding which this court referred to in *Belle Terre*, *supra*. The evidence introduced into the record before the trial court and later considered by the Court of Appeals demonstrated that the present single-family zoning bears a reasonable relationship to the general health, welfare, and safety of the community and is neither arbitrary

nor capricious. The expert testimony proved that it is economically feasible to develop the petitioner's property under the present single-family zoning. Indeed, the record showed that the best utilization of the petitioner's property —considering the Guide Plan and adjacent development— is for single family use. In this regard it must be noted that the petitioner's property was zoned in conformity with the comprehensive guide plan. In the *Village of Euclid v. Ambler Realty Company, supra*, this court expounded upon the merits of comprehensive zoning with special emphasis on apartment development:

> "The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. *With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and*

attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances." 272 U.S. 365, 394.

An extensive amount of testimony was received and considered in this case. The testimony proved to the satisfaction of the Zoning Board of Appeals, the trial court, and Appellate Court, and the Supreme Court of the State, that the zoning of the petitioner's property bears a reasonable relationship to the general health, welfare, and safety of the community. To allow the petitioner to increase her financial gain by building apartments in a single-family zone, under the facts and circumstances presented in the record, would undermine the whole purpose of comprehensive zoning and much worse, endanger the welfare of the community as a whole.

II. THIS COURT LACKS JURISDICTION TO CONSIDER THE SECOND QUESTION PRESENTED BY THE PETITIONER.

The petitioner claims that this court has jurisdiction to consider the questions she presents by virtue of Title 28, United States Code Section 1257 (3). This section reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> ...
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States."

The second question presented to this court by the petitioner reads as follows:

> "Whether or not the guarantees of procedural due process were afforded in the Petitions in the State Court and whether or not in so doing it failed to follow its own law."

This question contains only one allegation of a federally-protected right; that is, whether or not the failure of the trial court to make findings of fact and conclusions of law denied the petitioner Due Process of law as that term is used in the Fourteenth Amendment of the Constitution of the United States.

In the case of *Tacon v. Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973), this court construed Title 28, United States Code Section 1257 (3). The case involved the constitutional limits on the authority of the State of Arizona to try in absentia a person who voluntarily left the State and was unable to return, for financial reasons. Upon reviewing the record it appeared that the constitutional questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court. This court held that it could not decide issues raised for the first time at this level in the judicial proceedings. More specifically this court held that where an issue presented in a petition for certiorari was not raised below nor passed upon by the State's highest court, and where the only issue actually litigated does not alone justify exercise of certiorari jurisdiction, the writ of certiorari should be dismissed as improvidently granted.

The record in the case at bar shows that the question on this issue raised by the petitioner before the Ohio State Supreme Court was as follows:

> "Where, upon seasonal request, a court fails to enter its findings of fact and conclusions of law, the error is prejudicial and the offended party is entitled to a reversal as a matter of law."

This proposition of law and the petitioner's supporting argument in her memorandum in support of jurisdiction before the Ohio State Supreme Court raises no claim of any infringement of a federally-protected right. The proposition of law presented to the State court questioned whether the trial court properly complied with the State law and local rules as to the making of findings of fact and conclusions of law. The proposition of law is also addressed to the proper remedy if the Supreme Court found

that the trial court did not conform to the rules of the State. It must be noted that the petitioner never raised the issue of procedural due process or even intimated to the court that such an issue existed. Since the issue of procedural due process was never presented to the Ohio State Supreme Court, the court never rendered a decision on it.

This court has explicitly stated on numerous occasions that it will dismiss for lack of jurisdiction any petition for a writ of certiorari if the federal question to be argued was not raised, preserved, or passed on in the state court but simply raised here for the first time on review of a state court decision. *Tacon v. Arizona, supra; Monks v. New Jersey,* 398 U.S. 71, 90 S. Ct. 1563, 26 L. Ed. 2d 54 (1970); *Cardinale v. Louisiana,* 394 U.S. 437, 89 S. Ct. 1162, 22 L. Ed. 2d 398 (1969).

The petitioner in the case at bar did not raise, nor did the Ohio State Supreme Court nor any of the lower state courts adjudicate, such an alleged constitutional infringement. In order to bring the case at bar into this court, the petitioner is attempting to enlarge upon the contentions made and passed upon by the state courts by adding a new assignment of error. This court has made it clear that such attempts will not be tolerated. *Cleveland and Pittsburgh Railroad Company v. City of Cleveland, Ohio,* 235 U.S. 50, 35 S. Ct. 21, 59 L. Ed. 127 (1914).

III. THIS COURT LACKS JURISDICTION TO CONSIDER THE THIRD QUESTION PRESENTED BY THE PETITIONER.

The third question presented in this petition for a writ of certiorari is as follows:

> "Whether or not a municipality in a zoning matter, wherein a property owner is compelled to exhaust her

administrative remedy, may refuse to act from May 2, 1968 till February 4, 1971 wherein three (3) times during that period its Planning Commission has recommended action favorably to the Petitioner."

This question fails to set out the federally-protected right of which the petitioner feels she is being denied. By the way her question is presented, we are led to believe that her complaint is addressed to the time lag between May 2, 1968 and February 4, 1971. Since the petitioner cites only the Fourteenth Amendment in her petition, it seems that she is alleging that this time lag somehow denied her due process of law.

As she did in question two, the petitioner is again attempting to raise an issue here which she did not present to the state courts. An analysis of the petitioner's propositions of law before the Ohio State Supreme Court shows that the petitioner raised the issue of substantive due process but never presented any question as to procedural due process. The proposition of law raised by the petitioner before the Ohio State Supreme Court reads as follows:

"Where a property owner requests rezoning on May 2, 1968 with no final action by the Council until February 4, 1971; Where the Planning Commission of that Council on three separate occasions recommends that the premises be re-zoned as requested; where within that period, land immediately adjacent to the subject premises is re-zoned for multi-family use up to, but not beyond, the irregular property line of the owner, with no street, highway or other natural boundary excluding the exact boundary of the owner's property; where the subject premises are in part covered by a fireline easement from a United States Government nike site; where the premises are surrounded by commercial property apartments, greenhouses and nursery prop-

erty, a church and parking area, a convent and, in particular, a trailer park for mobile homes; where there have been no new housing starts of even modestly priced residential property in over fifteen years; where the plan proposed by the City for single family residential use would leave 28% of the land unavailable for that use; where at a cost of $75,000 per residence, the single family property is priced out of the market; where for multi-family use it would have a value of $620,000 and where there is no evidence presented to show that multi-family use would in any way offend against the public health, safety, welfare or morals, the refusal of the City Council to re-zone and or grant a building permit is arbitrary, capricious, unconstitutional and void."

If not made clear by this proposition of law that the petitioner presented only the issue of substantive due process to the court, it is made clear by the argument of the petitioner in her memorandum in support of jurisdiction before the Ohio State Supreme Court. The petitioner stated in her memorandum that:

"The *sole and only issue* before the Court in regulating the use of land is a constitutional issue. Control rests upon the police power of the State. Otherwise, the deprivation is confiscation with compensation. Without justification on the grounds of public health, welfare, safety and morals, control cannot be justified or sustained. Any violation is contrary to the Vth and XIVth Amendments to the Constitution of the United States of America and of Article 1, Section 19 of the Constitution of the State of Ohio." (Emphasis added).

Again, the petitioner never raised the question of procedural due process before the Supreme Court of the State of Ohio. The question cannot now be raised for the first

time on a writ of certiorari before this court. *Tacon v. Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973).

Even assuming that the question of procedural due process had been properly raised before the state court, the petitioner's allegations of a denial of due process have no basis in fact. This court has held that the concept of procedural due process can only be judged on the particular facts of each case. *Cf., Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The facts in the case at bar show that on May 2, 1968, John A. Thomson, a realtor, on behalf of the petitioner, submitted to the Council of the City of Westlake a letter requesting that the subject property be rezoned from single-family to multi-family use. On May 16, 1968, the Council referred this request to the Planning Commission for recommendation. No action was taken on this request at the time because during this period, the Planning Commission and the Council were devising a new comprehensive zoning code and zoning map encompassing the entire city. On January 6, 1970, a second request was made on behalf of the petitioner to rezone the property. On January 15, 1970, the Council referred the matter to the Planning and Zoning Committee of Council. Thereafter, Ordinance No. 1970-56 was drafted and placed on the Council agenda. The Planning and Zoning Committee recommended that the ordinance be further considered by Council, and the ordinance was placed on Council's agenda for its regular meeting of October 1, 1970. A public hearing was advertised and held as provided by the Charter of the City of Westlake, and was conducted on the evening of February 4, 1971. The ordinance was voted on that night by Council and unanimously defeated. If there was any delay in the consideration of the petitioner's request for rezoning, it was caused by the fact

that at that time the City was revamping the entire zoning scheme of the municipality, and the Council thought it more expedient to consider the petitioner's property in the context of the entire plan rather than as an isolated parcel.

In the petition for a writ of certiorari before this court, the petitioner complains that she was "locked in" and denied the right to proceed under the requirement that she first exhaust her administrative remedies. This is simply not true. The facts show that the petitioner was not "locked in" to any administrative system but rather locked herself in by pursuing a single remedy where alternative remedies were available. The petitioner was content with requesting Council to rezone her property and then waiting for Council's decision which would be made along with the revamping of the entire zoning scheme of the City. The petitioner knew that the consideration by Council of the zoning for the entire City would not be an overnight affair, but rather would take much study and painstaking deliberation. If the petitioner felt that the delay in time would cause her some type of hardship, she could have sought an immediate adjudication of her rights as to this property. The zoning ordinances of the City of Westlake provided for a hearing before the Zoning Board of Appeals for any property owner who felt that the present zoning of his parcel caused some type of unusual hardship. Codified Ordinances of Westlake, Chapter 1215. The State Code, Ohio Revised Code Chapter 2506, then provided for a court review of any order made by this administrative body. In fact, the petitioner did take advantage of this remedy but not until August 8, 1972. There was also another remedy available to the petitioner. She could have brought a declaratory judgment action directly before the Common Pleas Court as early as May 2, 1968.

The fact is that the petitioner was quite content to await the decision of Council when it considered her request for a rezoning along with its study of the zoning scheme for the entire city. The petitioner cannot now assert a denial of due process because of a delay which was self-imposed.

CONCLUSION

The respondent believes, as to the first question raised by the petitioner in her petition for a writ of certiorari, that there is no substance in fact to her allegations of a deprivation of property without due process of law. The evidence introduced before the Zoning Board of Appeals of the City of Westlake, the trial court, and considered by the Court of Appeals and the Supreme Court of Ohio, proved to the satisfaction of all four bodies that the zoning of the petitioner's property was reasonably related to the public health, safety, and welfare and within the police powers of the respondent-City. The respondent believes that the second and third questions presented by the petitioner are improperly before this court since they were never raised in the courts below. For this reason, this court lacks jurisdiction to consider them here for the first time.

For all the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

PATRICK A. GAREAU
21330 Center Ridge Road
Rocky River, Ohio 44116
Telephone: (216) 333-3100
Counsel for Respondent City of Westlake